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Nos. 14-556, 14-562, 14-571, and 14-574

In the Supreme Court of the United States

JAMES OBERGEFELL, et al., Petitioners,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, et al., Respondents.

VALERIA TANCO, et al., Petitioners,
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, et al., Respondents.

APRIL DEBOER, et al., Petitioners,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, et al., Respondents.

GREGORY BOURKE, et al., Petitioners,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, et al., Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE SCHOLARS OF HISTORY AND RELATED DISCIPLINES IN SUPPORT OF RESPONDENTS

CHARLES J. COOPER
Counsel of Record
HOWARD C. NIELSON, JR.
HOWARD N. SLUGH
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com
Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amici curiae are scholars of history and related disciplines in the social sciences and humanities. Amici have studied and written extensively about history, law, and civil society. Amici believe the historical material and arguments presented in this brief will assist the Court in evaluating the claim that the Fourteenth Amendment requires that marriage be redefined to include same-sex relationships. A list of amici and their affiliations (which are included for identification purposes only) is included as an appendix.

SUMMARY OF ARGUMENT

I. The traditional definition of marriage at issue in these cases is neither surprising nor invidious. To the contrary, until very recently, the definition of marriage as a relationship between individuals of opposite sex uniformly prevailed throughout this Nation from before its founding, as it had in all other civilizations throughout history.

Despite its age and ubiquity, this definition of marriage does not rest merely on tradition, nor is it in anyway arbitrary or irrational. Rather, history leaves no doubt that the traditional definition of marriage reflects the undeniable biological fact that only sexual relationships between men and women can naturally

[1] Respondents' letters consenting to the filing of amicus briefs are on file with the Court, and Petitioners have consented to the filing of this brief. *See* SUP. CT. R. 37.3(a). No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make a monetary contribution to the preparation or submission of this brief. *See* SUP. CT. R. 37.6.

create children. And from the lexicographers who have defined marriage, to scholars in every relevant field who have explained marriage, to the legislatures and courts that have given legal recognition and effect to marriage, eminent authorities throughout the ages have uniformly confirmed that the institution of marriage owes its very existence to society's vital need to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society.

This animating purpose of marriage is in no way undermined by the fact that societies have not conditioned marriage on any sort burdensome, intrusive, and ultimately futile case-by-case inquiry into the capacity or desire to procreate of each opposite-sex couple wishing to marry. For the purpose of marriage is not to ensure that all marriages produce children, but rather to channel the presumptive procreative potential of sexual relationships between men and women into enduring unions so that *if* any children are born, they will be more likely to be raised in stable family units by both the mothers and the fathers who brought them into this world.

Nor do the elimination of racial restrictions on marriage, the abolition of coverture, the liberalization of divorce laws, or other historical changes relating to the institution of marriage somehow establish that the traditional definition of marriage as a union of individuals of opposite sex is not central to that institution. For, unlike the traditional definition of marriage, neither antimiscegenation laws, nor coverture, nor any particular rule governing divorce were ever a universal feature of marriage. Nor were such laws ever

understood to be a *defining* characteristic of marriage—let alone so understood throughout history and across civilizations.

II. History forecloses Petitioners' claim that the traditional definition of marriage somehow violates the fundamental right to marry. Not only is a right to marry an individual of the same sex flatly contrary to our Nation's history, legal traditions, and practices, *see, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), it is at odds with the precedents of this Court, *see, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

III. In light of the historical understanding of marriage and its societal purposes, the line that our law has traditionally drawn between opposite-sex couples (who are generally capable of procreation) and same-sex couples (who are categorically incapable of natural procreation) "is neither surprising nor troublesome from a constitutional perspective." *Nguyen v. INS*, 533 U.S. 53, 63 (2001). To the contrary, it is plainly reasonable for a State to maintain a unique institution to address the unique societal risks and benefits that arise from the unique procreative potential of sexual relationships between men and women. More generally, marriage, which has prevailed continuously in our Nation's history and traditions and virtually everywhere else throughout human history can justly be said to be rational—and constitutional—*per se*. *See, e.g.*, *Glucksberg*, 521 U.S. at 723; *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995).

IV. Finally, history makes clear that the purpose of marriage is not, and has never been, to disparage or demean gays and lesbians. Society recognizes opposite-sex unions as marriages not because it deems individuals in such relationships to be virtuous or

praiseworthy, but rather because society has a vital interest in increasing the likelihood that the unique procreative potential of sexual relationships between men and women will benefit, rather than harm, society. Conversely, the fact that the definition of marriage has not traditionally encompassed same-sex relationships does not reflect a judgment that individuals in such relationships are somehow inferior or undeserving, but rather the biological reality that those relationships simply do not implicate society's interest in responsible procreation in the same way that sexual relationships between men and women do.

ARGUMENT

I. The Traditional Definition of Marriage Is Deeply Rooted in the Historical Understanding of Marriage and Its Purposes.

A. Marriage Has Been Understood and Defined as a Relationship Between Individuals of Opposite Sex Throughout the History of This Nation—and Indeed Throughout the History of Civilization.

Petitioners challenge the constitutionality of the age-old definition of marriage as a union between a man and a woman, as reflected in the constitutions, statutes, and common law of Kentucky, Michigan, Ohio, and Tennessee. The definition of marriage in these States is neither surprising nor invidious. To the contrary, until a few short years ago this definition uniformly prevailed throughout this Nation, as it had since before its founding, including during the period when the Fourteenth Amendment was framed and ratified. As Judge Sutton accurately recognized in

the decision below, "marriage has long been a social institution defined by relationships between men and women. So long defined, the tradition is measured in millennia, not centuries or decades. So widely shared, the tradition until recently had been adopted by all governments and major religions of the world." *DeBoer v. Snyder*, 772 F.3d 388, 395–96 (6th Cir. 2014).

Indeed, until very recently "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (2006). And as the highly respected anthropologist Claude Levi-Strauss has explained, "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." THE VIEW FROM AFAR 40–41 (1985); *see also* G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988) ("Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies."); JAMES Q. WILSON, THE MARRIAGE PROBLEM 24 (2002) (noting that "a lasting, socially enforced obligation between man and woman that authorizes sexual congress and the supervision of children" has existed "[i]n every community and for as far back in time as we can probe").

Further, the opposite-sex character of marriage has traditionally been understood to be a central—indeed *defining*—feature of this institution, as reflected in dictionaries throughout the ages. Samuel Johnson,

for example, defined marriage as the "act of uniting a man and woman for life." A DICTIONARY OF THE ENGLISH LANGUAGE (1755). Subsequent dictionaries consistently defined marriage in the same way, including the first edition of Noah Webster's, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), and prominent dictionaries from the time of the framing and ratification of the Fourteenth Amendment, *see, e.g.*, NOAH WEBSTER, ETYMOLOGICAL DICTIONARY (1st ed. 1869); JOSEPH E. WORCESTER, A PRIMARY DICTIONARY OF THE ENGLISH LANGUAGE (1871). A leading legal dictionary from that time similarly defined marriage as "[a] contract, made in due form of law, by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife." JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES 105 (1868); *see also* 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE § 29 (1st ed. 1852) ("[M]arriage ... is a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex.").

Until very recently, dictionaries uniformly reflected the same understanding. For example, marriage was defined as "the state of being united to a person of the opposite sex as husband or wife," as "the formal union of a man and a woman, typically recognized by law, by which they become husband and wife," and as "[t]he legal union of a man and woman as husband and wife" by the 2003 edition of WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, the

2001 edition of the NEW OXFORD AMERICAN DICTIONARY, and the Third Edition of AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1992), respectively. Likewise, from the first edition of Black's Law Dictionary in 1891 to the seventh edition in 1999, the term "marriage" was exclusively reserved for the union of a man and a woman. *See* BLACK'S LAW DICTIONARY 986 (7th ed. 1999); BLACK'S LAW DICTIONARY 972 (6th ed. 1990); BLACK'S LAW DICTIONARY 876 (5th ed. 1979); BLACK'S LAW DICTIONARY 1123 (4th ed. 1951); BLACK'S LAW DICTIONARY 1163–64 (3d ed. 1933); BLACK'S LAW DICTIONARY 762–63 (2d ed. 1910); BLACK'S LAW DICTIONARY 756–57 (1st ed. 1891).[2]

B. The Historical Understanding of Marriage Makes Clear that It Is Bound Up with the Procreative Potential of Sexual Relationships Between Men and Women.

This longstanding definition of marriage as the union of a man and a woman does not rest merely on

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[2] More recent editions of these dictionaries generally retain this traditional understanding as their principal definition of marriage while also acknowledging the recent advent of same-sex marriage in some jurisdictions. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2015), *available at* http://goo.gl/uOmd02; NEW OXFORD AMERICAN DICTIONARY (2010); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011); BLACK'S LAW DICTIONARY 992, 994 (8th ed. 2004). The most recent edition of BLACK'S LAW DICTIONARY goes further, defining marriage principally as "[t]he legal union of a couple as spouses." BLACK'S LAW DICTIONARY 1059 (9th ed. 2009). The recent vintage of such definitions underscores their lack of grounding in the history, legal traditions, and practices of our Country.

tradition, nor is it in any way arbitrary or irrational. Rather, the record of human history leaves no doubt that the traditional understanding of marriage reflects the undeniable biological reality that sexual relationships between men and women—and only such relationships—can naturally create children. Marriage, thus, is "a social institution with a biological foundation." Claude Levi-Strauss, *Introduction*, *in* 1 A HISTORY OF THE FAMILY: DISTANT WORLDS, ANCIENT WORLDS 5 (Andre Burguiere et al. eds., 1996).

And that biological foundation—the unique procreative potential of sexual relationships between men and women—implicates vital social interests. On the one hand, procreation is necessary to the survival and perpetuation of society and, indeed, the human race; accordingly, the responsible creation, nurture, and socialization of the next generation is a vital—indeed existential—social good. On the other hand, irresponsible procreation and childrearing—the all too frequent result of casual or transient sexual relationships between men and women—commonly results in hardships, costs, and other ills for children, parents, and society as a whole. As eminent authorities throughout the ages have uniformly recognized, an overriding purpose of marriage in virtually every society is, and has always been, to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In particular, through the institution of marriage, societies seek to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.

This central purpose of marriage was well explained by William Blackstone, who, speaking of the "great relations in private life," described the relationship of "husband and wife" as "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *410 (1765). Blackstone then immediately turned to the relationship of "parent and child," which he described as "consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated." *Id.*; *see also id.* at *435 ("[T]he establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfill this obligation; whereas, in promiscuous and illicit conjunctions, the father is unknown ...."). John Locke likewise wrote that marriage "is made by a voluntary compact between man and woman," SECOND TREATISE OF CIVIL GOVERNMENT § 78 (1690), and then provided essentially the same explanation of its purposes:

> For the end of conjunction, between male and female, being not barely procreation, but the continuation of the species; this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones, ... who are to be sustained by those that got them, till they are able to shift and provide for themselves.

Id. § 79. Montesquieu similarly recognized that "[t]he natural obligation of the father to provide for his children has established marriage, which makes known the person who ought to fulfill this obligation." 2 THE SPIRIT OF LAWS 96 (Dublin ed. 1751).

Throughout history, other leading linguists, lawyers, social scientists, and historians have likewise consistently recognized the essential connection between marriage and responsible procreation and childrearing. *See, e.g.*, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (Marriage "was instituted ... for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children."); 1 BISHOP, COMMENTARIES § 39 ("The husband is under obligation to support his wife; so is he to support his children.... The relation of parent and child equally with that of husband and wife, from which the former relation proceeds, is a civil status ...."); BRONISLAW MALINOWSKI, SEX, CULTURE, AND MYTH 11 (1962) ("[T]he institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents ...."); QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 ("Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."); JAMES Q. WILSON, THE MARRIAGE PROBLEM 41 (2002) ("Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."); WHY MARRIAGE MATTERS 15 (W.

Bradford Wilcox et al. eds., 2d ed. 2005) ("As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society."); ROBERT P. GEORGE ET AL., WHAT IS MARRIAGE? 39 (2012) ("The universal social need presented by relationships that can produce new, dependent human beings explains why every society in the history of our race has regulated men and women's sexual relationships: has recognized marriage."). In the words of the sociologist Kingsley Davis:

> The family is the part of the institutional system through which the creation, nurture, and socialization of the next generation is mainly accomplished. ... The genius of the family system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring. By identifying children with their parents ... the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring.

The Meaning & Significance of Marriage in Contemporary Society 7–8, *in* CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION (Kingsley Davis ed., 1985).

This understanding of marriage and its central purposes has prevailed in the States of the Sixth Circuit throughout their history, just as it has everywhere else. *See, e.g.*, MICH. COMP. LAWS § 551.1 ("Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order

to promote, among other goals, the stability and welfare of society and its children."). It is implicit in many venerable but still vital mandatory features of the institution of marriage, including the monogamous nature of the marriage relationship, *see, e.g.*, KY. REV. STAT. § 402.020; MICH. COMP. LAWS § 551.5; OHIO REV. CODE § 3101.01; TENN. CODE § 36-3-102, the obligation of fidelity between marital partners, *see, e.g.*, OHIO REV. CODE § 3103.01; TENN. CODE 36-4-101(a)(3), the obligation of spouses to support their children, *see, e.g.*, KY. REV. STAT. § 402.270; OHIO REV. CODE § 3103.03, and the presumption of paternity afforded to fathers married to a child's mother, *see, e.g.*, KY. REV. STAT. § 406.011; MICH. COMP. LAWS § 552.29; OHIO REV. CODE § 3111.03; TENN. CODE § 36-2-304.

The persistence of these timeless marital norms—which spouses cannot contract around, *see, e.g.*, OHIO REV. CODE § 3103.06—is inexplicable apart from society's interest in increasing the likelihood that children will be born to and raised in stable family units by the couples who brought them into the world. The abiding connection between marriage and responsible procreation and childrearing is also reflected in laws governing dissolution of a marriage relationship, including procedural safeguards governing dissolution of marriages that have produced minor children, *see, e.g.*, KY. REV. STAT. § 403.044; MICH. COMP. LAWS §§ 552.9f, 552.15; TENN. CODE § 36-4-103, the requirements that adequate provision be made for the support of any minor children of the marriage, *see, e.g.*, KY. REV. STAT. § 403.140(1)(d); OHIO REV. CODE § 3105.21(A); TENN. CODE § 36-5-101, and the rule that concealment of known sterility is one of very few

grounds for annulment on the basis of fraud.[3] And throughout our Nation's history, the state courts have repeatedly acknowledged and relied upon this understanding of marriage and its purposes.[4]

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[3] *See, e.g.*, *Stegienko v. Stegienko*, 295 N.W. 252, 254 (Mich. 1940) ("Procreation of children is one of the important ends of matrimony; and when a woman, knowing herself to be barren and incapable of conceiving and bearing children by reason of an operation, does not disclose this fact to her intended husband, he, upon discovering such sterility after marriage, is entitled to a decree of annulment on the ground of fraud." (citation omitted)).

[4] *See, e.g.*, *Wray v. Wray*, 19 Ala. 522, 525 (1851); *State v. Adams*, 522 P.2d 1125, 1131 (Alaska 1974); *Standhardt v. Superior Ct. ex rel. Cnty. of Maricopa*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003); *Pryor v. Pryor*, 235 S.W. 419, 421-22 (Ark. 1922); *De Burgh v. De Burgh*, 250 P.2d 598, 601 (Cal. 1952); *Archina v. People*, 135 Colo. 8, 24-25 (1957); *Fattibene v. Fattibene*, 441 A.2d 3, 6 (Conn. 1981); *A. v. A.*, 43 A.2d 251, 252 (Del. 1945); *Zoglio v. Zoglio*, 157 A.2d 627, 628 (D.C. 1960); *Kennedy v. Kennedy*, 101 Fla. 239, 245-46 (1931); *Head v. Head*, 2 Ga. 191, 205 (1847); *Howay v. Howay*, 74 Idaho 492, 499-500 (1953); *Hamaker v. Hamaker*, 18 Ill. 137, 141 (1856); *O'Connor v. O'Connor*, 253 Ind. 295, 310 (1969); *In re Estate of Oldfield*, 175 Iowa 118, 131 (1916); *State v. Walker*, 36 Kan. 297, 307 (1887); *Ledoux v. Her Husband*, 10 La. Ann. 663, 664 (La. 1855); *Deblois v. Deblois*, 158 Me. 24, 30 (1962); *Conaway v. Deane*, 932 A.2d 571, 619-20 (Md. 2007); *Inhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. 48, 52-53 (1810); *Sissung v. Sissung*, 65 Mich. 168, 171 (1887); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); *Walker v. Walker*, 140 Miss. 340, 351 (1925), *overruled in part on other grounds*, *Davis v. Davis*, 194 Miss. 343 (1943); *State Use of Gentry v. Fry*, 4 Mo. 120, 181 (1835); *In re Rash's Estate*, 53 P. 312, 313 (Mont. 1898); *Collins v. Hoag & Rollins*, 241 N.W. 766, 767 (Neb. 1932); *Wilson v. Wilson*, 66 Nev. 405, 417-18 (1949); *Bascomb v. Bascomb*, 25 N.H. 267, 275 (1852); *Melia v. Melia*, 226 A.2d 745, 747 (N.J. Ch. 1967); *Tallent v. Tallent*, 91 P.2d 504, 504 (N.M. 1939); *Mirizio v. Mirizio*, 150 N.E. 605, 607 (N.Y. 1926); *Allen v. Baker*, 86 N.C. 91, 97 (1882); *Mahnken v. Mahnken*, 82 N.W. 870, 872 (N.D. 1900); *Hine v. Hine*, 25 Ohio App. 120, 123 (1927); *Peterson*

As illustrated by these and many similar authorities—from the lexicographers who have defined marriage, to the eminent scholars in every relevant academic discipline who have explained marriage, to the legislatures and courts that have given legal recognition and effect to marriage—the understanding of marriage as a union of man and woman, uniquely involving the rearing of children born of their union, is age-old, universal, and enduring. Indeed, prior to the recent movement to redefine marriage to include same-sex relationships, it was commonly understood and accepted, without a hint of controversy, that the institution of marriage owed its very existence to society's vital interest in responsible procreation and childrearing.

To be sure, individuals marry, as they always have, for love, financial security, social status, companionship, personal fulfillment, and a variety of other reasons. But none of these *personal* reasons can explain *society's* interest in recognizing certain relationships as marriages. It is also no doubt true that at various times and in different places marriage has served other societal purposes *in addition to* responsible procreation. But no purpose other than responsible procreation can explain why marriage is, as this Court

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v. Peterson, 240 P.2d 1075, 1076-77 (Okla. 1952); *Westfall v. Westfall*, 100 Or. 224, 237 (1921); *Matchin v. Matchin*, 6 Pa. 332, 337 (1847); *Rymanowski v. Rymanowski*, 105 R.I. 89, 96 (1969); *McCreery v. Davis*, 22 S.E. 178, 181 (S.C. 1895); *In re Marriage of J.B. & H.B.*,326 S.W.3d 654, 677-78 (Tex. App. 2010); *Sanchez v. LDS Social Servs.*, 680 P.2d 753, 755-56 (Utah 1984); *Foster v. Redfield*, 50 Vt. 285, 290-91 (1877); *Pretlow v. Pretlow*, 14 S.E.2d 381, 385 (Va. 1941); *Grover v. Zook*, 44 Wash. 489, 493-94 (1906); *Wills v. Wills*, 74 W. Va. 709, 712 (1914); *Heup v. Heup*, 172 N.W.2d 334, 336 (Wis. 1969); *In re St. Clair's Estate*, 28 P.2d 894, 897 (Wyo. 1934).

has repeatedly recognized, "fundamental to our very existence and survival." *E.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Nor can any other purpose plausibly explain why marriage even exists at all—let alone why it has existed in every known society throughout history. As Bertrand Russell put it, "[b]ut for children, there would be no need of any institution concerned with sex ...." BERTRAND RUSSELL, MARRIAGE & MORALS 46 (2009 ed.). Indeed, if "human beings reproduced asexually and ... human offspring were born self-sufficient[,] ... would any culture have developed an institution anything like what we know as marriage? It is clear that the answer is no." GEORGE, WHAT IS MARRIAGE? 96.[5]

C. That Opposite-Sex Couples Who Cannot or Do Not Wish To Have Children Are Allowed To Marry Is Fully Consistent with the Historical Understanding of Marriage and Its Purposes.

Petitioners dispute this historical account of marriage and its purposes, arguing that "[t]he right to marry in the United States has never ... been linked to either a capacity or a desire to procreate ...." Brief for Petitioners at 62, *DeBoer v. Snyder*, 2015 WL 860740 (S. Ct. 2015) ("DeBoer Br."). This argument appears to rest on the assumption that marriage can

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[5] *See also, e.g.*, DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 66 (1751) ("The long and helpless Infancy of Man requires the Combination of Parents for the Subsistence of their Young; and that Combination requires the Virtue of CHASTITY or Fidelity to the Marriage-bed. Without such an *Utility*, 'twill readily be own'd, such a Virtue would never have been thought of.").

further society's interest in responsible procreation and childrearing only if opposite-sex couples are *required* to bear and raise children as a *condition* of marriage. But societies have likewise never *required* that would-be spouses actually love each other or that each individual marriage actually further any other marital purpose asserted by Petitioners in this litigation. *See DeBoer*, 772 F.3d at 407. Thus, not only do the various alternative purposes for marriage posited by Petitioners lack the explanatory power and universal recognition of the procreative purposes repeatedly articulated throughout the ages, they also afford no better fit with the history, traditions, and practice of marriage in this or any other Nation.

More important, the overriding societal purpose of marriage is *not* to ensure that all marital unions produce children. Rather, it is to channel the presumptive procreative *potential* of sexual relationships between men and women into enduring marital unions so that *if* any children are born, they will be more likely to be raised in stable family units by both the mothers and the fathers who brought them into the world. *See, e.g.*, *Morrison v. Sadler*, 821 N.E.2d 15, 30 (Ind. Ct. App. 2005) ("[M]arriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences."). In other words, because society prefers married opposite-sex couples without children to children without married mothers and fathers, it encourages marriage for all

(otherwise eligible) heterosexual relationships, including those relatively few that may not produce offspring.[6]

In all events, it would be utterly impractical for any society to attempt to *mandate* that all married couples be willing and able to procreate. Even if some society (implausibly) desired to do so, such a policy would presumably require enforcement measures—from premarital fertility testing to eventual annulment of childless marriages—that would surely trench upon constitutionally protected privacy rights, as several courts have noted. *See, e.g.*, *Standhardt v. Superior Ct. ex rel. Cnty. of Maricopa*, 77 P.3d 451, 462 (Ariz. Ct. App. 2003); *Adams v. Howerton*, 486 F. Supp. 1119, 1124–25 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982). And such Orwellian measures would be unreliable in any event. Most obviously, many fertile opposite-sex couples who plan not to have children have "accidents" or simply "change their minds." *Morrison*, 821 N.E.2d at 24–25. And at least some couples who believe that they are unable to have children may find out otherwise, given the "scientific (i.e., medical) difficulty or impossibility" of reliably determining fertility. Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL'Y 313, 345 (2008). In short, "[w]hile same-sex couples and opposite-sex couples are easily distinguished, limiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary and

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[6] Nearly 90% of married women have given birth to a child by their early forties. *See* Anjani Chandra, Ph.D. et al., *Infertility and Impaired Fecundity in the U.S., 1982–2010* at 15 tbl.3 (67 Nat'l Health Statistics Reps.), CDC.GOV (Aug. 14, 2013), http://goo.gl/vhdH1C.

unreliable line-drawing." *Hernandez*, 855 N.E. 2d at 11–12.

Moreover, even when an opposite-sex couple's infertility is clear, rarely are both spouses infertile.[7] In such cases, marriage furthers society's vital interest in responsible procreation by decreasing the likelihood that the fertile spouse will engage in potentially procreative sexual activity with a third party, for that interest is served not only by *increasing* the likelihood that procreation occurs only *within* the marital union, but also by *decreasing* the likelihood that it occurs *outside* of such unions. This critical societal interest, of course, pertains exclusively to infidelity with individuals of the opposite sex, for infidelity with individuals of the same sex poses no risk of procreation at all.

Infertile marriages between individuals of opposite sex also advance the institution's central procreative purposes by strengthening the social norm that sexual relationships between men and women—which in general, though not every case, can produce offspring—should be channeled into marital unions. *See, e.g.*, Stewart, *Marriage Facts*, 31 HARV. J. L. & PUB. POL'Y at 344 ("By normalizing and privileging marriage as the situs for man-woman intercourse and

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[7] This is often true even for elderly couples. *See, e.g.*, B. Eskenazi et al., *The Association of Age and Semen Quality in Healthy Men*, 18 HUM. REPROD. 447, 447 (2003) ("Human spermatogenesis ... continues well into advanced ages, allowing men to reproduce during senescence."); Bianca Kühnert & Eberhard Nieschlag, *Reproductive Functions of the Ageing Male*, 10 HUM. REPROD. UPDATE 327, 329 (2004) ("Undoubtedly, male fertility is basically maintained until very late in life, and, in addition to anecdotal reports, it has been documented scientifically up to an age of 94 years." (citation omitted)).

thereby seeking to channel all heterosexual intercourse within that institution, society seeks to assure that when man-woman sex does produce children, those children receive from birth onward the maximum amount of private welfare.").

It is thus neither surprising nor significant that societies throughout history have chosen to forego any sort of Orwellian and ultimately futile attempt to determine the fertility and childbearing intentions of couples seeking to marry on a case-by-case basis and have relied instead on the "common-sense proposition," *Vance v. Bradley*, 440 U.S. 93, 112 (1979), that sexual relationships between men and women are, in general, capable of procreation. *See, e.g.*, *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 315–16 (1976) (holding that State may rely on reasonable but imperfect irrebuttable presumption rather than conduct individualized testing). Nor is it surprising that many courts have rejected the same argument that Petitioners raise here, squarely and repeatedly holding that the animating procreative purpose of marriage is in no way negated by the fact that societies have not conditioned marriage on capacity or desire to procreate.[8] For the line that the States within the Sixth Circuit and, until very recently, all other societies have drawn

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[8] *See, e.g.*, *DeBoer*, 772 F.3d at 407; *Ex parte State of Alabama ex rel. Alabama Policy Inst.*, 2015 WL 892752, at *37 (Ala. Mar. 3, 2015); *Baker*, 191 N.W.2d at 187; *Standhardt*, 77 P.3d at 462-63; *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1113-14 (D. Haw. 2012), *vacated as moot*, 585 F. App'x 413 (9th Cir. 2014); *Hernandez*, 855 N.E.2d at 11-12; *Andersen v. King Cnty.*, 138 P.3d 963, 983 (Wash. 2006) (en banc) (plurality); *Conaway*, 932 A.2d at 631-34; *Morrison*, 821 N.E.2d at 27.

between opposite-sex couples, who in the vast majority of cases are capable of procreation, and same-sex couples, who are categorically infertile, is precisely the type of "commonsense distinction" between groups that "courts are compelled under rational-basis review to accept ...." *Heller v. Doe*, 509 U.S. 312, 321, 326 (1993).

Indeed, even when heightened scrutiny applies, this Court has held that a classification need not be accurate "in every case" so long as "in the aggregate" it advances the underlying objective. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 579, 582–83 (1990), *overruled on other grounds, Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *see also Nguyen v. INS*, 533 U.S at 69 (upholding an "easily administered scheme" that avoids "the subjectivity, intrusiveness, and difficulties of proof" of an "inquiry into any particular bond or tie"); *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 475 (1981) (plurality) (rejecting as "ludicrous" an argument that a law criminalizing statutory rape for the purpose of preventing teenage pregnancies was "impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant"); *id.* at 480 n.10 (Stewart, J., concurring) (rejecting argument that the statute was "overinclusive because it does not allow a defense that contraceptives were used, or that procreation was for some other reason impossible," because, *inter alia*, "a statute recognizing [such defenses] would encounter difficult if not impossible problems of proof").

Simply put, conditioning marriage on a burdensome and intrusive process of case-by-case inquiries

into opposite-sex couple's fertility is not a "real alternative" for achieving society's compelling interests in responsible procreation and childrearing, and the fact that the Respondent States, not to mention all other societies in recorded history, have never done so casts no doubt whatsoever on the traditional procreative purpose of marriage. *See Adams*, 486 F. Supp. at 1124–25.

D. Changes in Other Laws Relating to Marriage Do Not Refute the Central Role of the Traditional Definition of Marriage in the Historical Understanding of That Institution and Its Purposes.

Petitioners also contend that certain historical changes in the institution of marriage—in particular, the elimination of racial restrictions on marriage, the abolition of coverture, and the liberalization of divorce laws—somehow establish that the traditional definition of marriage as the union of a man and a woman is not central to that institution and that redefining marriage to include same-sex couples would no more change the fundamental nature of marriage than did those earlier changes. *See* DeBoer Br. 64. But as this Court has recognized, and as demonstrated above, until very recently "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). The same cannot be said of racial restrictions, coverture, or the rules governing divorce.

To be sure, antimiscegenation laws once blighted the legal landscape of *some* of the States for *part* of this Nation's history. But such laws were never universal. To the contrary, interracial marriages were legal at common law, in six of the thirteen original States at the time the Constitution was adopted, and in many States that at no point ever enacted antimiscegenation laws. *See, e.g.*, Irving G. Tragen, *Statutory Prohibitions Against Interracial Marriage*, 32 CALIF. L. REV. 269, 269 & n.2 (1944) ("[A]t common law there was no ban on interracial marriage."); Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 HOW. L.J. 117, 180–81 (2007) (State-by-State description of historical antimiscegenation statutes); PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 41, 253–54 (2002).

Even where they existed, moreover, such laws were never understood to be a *defining* characteristic of marriage. And they were certainly never universally so understood, throughout history and across civilizations. Indeed, even in ante-bellum America, the leading treatise on marriage described racial restrictions on marriage as "impediments, which are known only in particular countries, or States." 2 BISHOP, COMMENTARIES § 213. By contrast, the same treatise stated categorically that "[i]t has *always* ... been deemed requisite to the *entire* validity of *every* marriage ... that the parties should be of different sex" and that "[m]arriage between two persons of one sex could have no validity." *Id.* § 225 (emphases added).

Nor was coverture, which restricted the property (and other) rights of married women, ever universally

understood to be a defining characteristic of marriage. Thus, Bishop's treatise on the law of marriage recognized in 1852 that

> [t]here is a distinction between the marriage status and those property rights which are attendant upon and more or less closely connected with it.... Rights of property are attached to it on very different principles in different countries; in some there is a *communio bonorum*; in some each retain their separate property; by our law it is vested in the husband. Marriage may be good independent of any considerations of property, and the *vinculum fidei* may well subsist without them.

1 BISHOP, COMMENTARIES § 37 (quotation mark omitted). Indeed, coverture was never part of the civil law and thus did not apply in civil law countries or even outside the common-law courts in England and the United States. *See* 1 BLACKSTONE, COMMENTARIES *432. Nor was it ever fully established in States in this Nation that were originally colonized by civil law countries. *See, e.g.*, JAMES SCHOULER, LAW OF THE DOMESTIC RELATIONS 182 (1905).

The same is true of divorce. To be sure, marriage has traditionally been understood to be a presumptively life-long commitment. But throughout history, the rules for ending that commitment have varied from State to State, from nation to nation, and from civilization to civilization. Again, Bishop's treatise on marriage recognized at the time the Fourteenth Amendment was framed and ratified that

> [t]here is no question upon which a greater diversity of sentiment has prevailed in different ages, and among different nations and individuals of civilized men, nor upon which there is at present a greater division of opinion, than whether, and for what causes, a marriage originally valid, may properly be dissolved.

2 BISHOP, COMMENTARIES § 269. In light of this historical diversity, it is clear that no particular rule governing divorce has ever been understood to be a defining characteristic of marriage, let alone universally so understood.

II. History and Precedent Foreclose Petitioners' Claims that the Traditional Definition of Marriage Violates the Fundamental Right To Marry.

A. The historical understanding of marriage and its purposes makes short work of Petitioners' claim that the traditional definition of marriage somehow violates the fundamental right to marry. In *Washington v. Glucksberg*, this Court clarified and delimited the process for identifying and defining the fundamental rights protected by the Due Process Clause. The Court emphasized "two primary features" of this substantive-due-process analysis. 521 U.S. at 720. First, the Due Process Clause provides special protection only to "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–

21 (quotation marks and citations omitted). "Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking that direct and restrain [judicial] exposition of the Due Process Clause." *Id.* at 721 (quotation marks and citation omitted). Second, identification of fundamental rights "require[s] ... a careful description of the asserted fundamental liberty interest." *Id.* (quotation marks omitted). These principles are intentionally strict, for "extending constitutional protection to an asserted right or liberty interest ... to a great extent, place[s] the matter outside the arena of public debate and legislative action" and may thus "pretermit other responsible solutions being considered in Congress and state legislatures." *District Att'y's Office v. Osborne*, 557 U.S. 52, 73 (2009) (quotation marks omitted). Courts "must therefore exercise the utmost care whenever ... asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences" of judges. *Glucksberg*, 521 U.S. at 720 (quotation marks omitted).

Any purported right to marry a person of the same sex plainly fails the test this Court has mandated for identifying fundamental rights. Far from being "objectively, deeply rooted in this Nation's history and tradition," marriage between same-sex partners was entirely unknown to the laws of this Nation before 2004. Thus, just as in *District Attorney's Office v. Osborne*, "[t]here is no long history of such a right, and [t]he mere novelty of such a claim is reason enough to doubt that substantive due process sustains it." 557 U.S. at 72 (second alteration in original) (quotation marks omitted).

Petitioners nevertheless assert that the fundamental right to marry that has been recognized by this Court somehow encompasses a right to marry a person of the same sex. Given the complete absence of marriage between same-sex partners from "[o]ur Nation's history, legal traditions, and practices," Petitioners are forced to abandon this Court's requirement of a "careful description of the asserted fundamental liberty interest," and instead to frame the established fundamental right to marry as a generalized, abstract "right to marry the person of one's choice."

But as the discussion above makes clear, Petitioners' revisionist abstractions simply cannot be squared with the historical record. After all, until a mere eleven years ago, no one in this Country was permitted to marry the person of his or her choice without regard to gender nor, before the Netherlands redefined marriage in 2001, were marriages between individuals of the same sex recognized anywhere in the World. Furthermore, every State in this Nation imposes various other restrictions on the right to choose one's marriage partner relating to matters such as consanguinity, marital status, and age. Not only do these familiar restrictions belie Petitioners' claim of an unfettered right to marry the individual of one's choice, it is far from clear that they could survive the exacting scrutiny that would necessarily follow from recognition of the ahistorical right Petitioners assert. Indeed, many of these restrictions, though now widespread and familiar, are far less firmly rooted in the history, tradition, and practice of marriage than is the traditional definition of that institution.

In short, far from being deeply rooted in our "Nation's history, legal traditions, and practices,"

Glucksberg, 521 U.S. at 721, the unfettered, abstract right to marry the person of one's choice asserted by Petitioners is palpably at odds with centuries of history, legal tradition, and practice. This Court should reject Petitioners' invitation to disregard the requirement of a "careful description" of asserted fundamental rights, to abandon "crucial guideposts for responsible decisionmaking" under the Due Process Clause, and to "transform[ ] the policy preferences" of its members into constitutional law. *Id.* (quotation marks and citations omitted).

B. This Court's cases vindicating the fundamental right to marry likewise provide no support for the ahistorical right asserted by Petitioners. To be sure, the right to marry belongs to "all individuals." *Zablocki v. Redhail*, 434 U.S. at 384. But the question here is not, as Petitioners would have it, *who* has the right to marry, but rather what the right to marry *is*. And even a cursory review of this Court's precedent makes clear that, consistent with the traditional understanding of marriage and its purposes, the fundamental right to marry is the right to enter a legally recognized union with a person of the opposite sex.

First, all of this Court's cases vindicating the right to marry involved unions between men and women. All involved "marriage"—a term traditionally understood by this Court, like everyone else, to mean "the union for life of one man and one woman." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). And all were decided at a time when "marriage between a man and a woman" was "no doubt ... thought of by most people as essential to the very definition of that term and to its role and function." *Windsor*, 133 S. Ct. at 2689.

Further, this Court's opinions discussing the fundamental right to marry have repeatedly and plainly acknowledged the abiding connection between marriage and the unique procreative potential of sexual relationships between men and women. *See, e.g.*, *Zablocki*, 434 U.S. at 384 (describing "marriage" as "fundamental to the very existence and survival of the race"); *id.* at 386 (vindicating the right to "marry and raise the child in a traditional family setting"); *Loving*, 388 U.S. at 12 ("Marriage is ... fundamental to our very existence and survival."); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (The right to "marry, establish a home and bring up children ... [is] essential to the orderly pursuit of happiness by free men."); *cf. Bowers v. Hardwick*, 478 U.S. 186, 215 (1986) (Stevens, J., dissenting) (describing marriage as societal "license to cohabit and to produce legitimate offspring"). Indeed, "[a]n historical survey of Supreme Court cases concerning the fundamental right to marry ... demonstrates that the Court has called this right fundamental because of its link to procreation." *Dean v. District of Columbia*, 653 A.2d 307, 332 (D.C. 1995) (opinion of Ferren, J.) (quotation marks omitted). Petitioners' reading of these cases as recognizing a gender-blind right to marry would render them utterly incoherent. And it would "redefine the right in question and ... tear the resulting new right away from the very roots that caused the U.S. Supreme Court ... to recognize marriage as a fundamental right in the first place." *Hernandez*, 855 N.E.2d at 14 (Graffeo, J., concurring); *see also, e.g.*, *Standhardt*, 77 P.3d at 458.

Nor can there be any doubt that these cases would have come out differently if they had been brought by same-sex couples. Indeed, a scant five years after *Loving v. Virginia*—this Court's seminal fundamental right to marry decision—a same-sex couple *did* bring such a case, citing *Loving*, and this Court in *Baker v. Nelson* unanimously and summarily rejected precisely the same purported fundamental right asserted by Petitioners here. *See* 409 U.S. 810 (1972).

III. The Historical Understanding of Marriage and Its Purposes Confirms that the Traditional Definition of Marriage Is Both Rational and Constitutional.

As demonstrated above, history makes clear that the traditional definition of marriage is rooted in the simple and undeniable biological fact that sexual relationships between men and women are the only type of human relationships that can naturally create children. History likewise makes clear that the procreative potential of sexual relationships between men and women goes to the heart of society's traditional interest in regulating intimate relationships. Especially in light of this history, it is plainly reasonable for a State to maintain a unique institution to address the unique societal risks and benefits that arise from the unique procreative potential of sexual relationships between men and women.

To be sure, the traditional definition of marriage treats opposite-sex couples differently from all other types of relationships, including same-sex couples. But same-sex relationships are "different, immutably

so, in relevant respects" from sexual relationships between men and women. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985). For however similar they may be to such relationships in other respects, same-sex relationships simply cannot naturally produce children, responsibly or otherwise. Accordingly, they do not implicate the State's traditional interest in responsible procreation and childrearing in the same way that sexual relationships between men and women do.

Given this immutable biological difference, as well as marriage's central and abiding concern with responsible procreation and childrearing, the "commonsense distinction," *Heller*, 509 U.S. at 326, drawn by societies throughout history between same-sex couples and opposite-sex couples "is neither surprising nor troublesome from a constitutional perspective." *Nguyen*, 533 U.S. at 63 (2001); *see also id.* at 73 ("To fail to acknowledge even our most basic biological differences ... risks making the guarantee of equal protection superficial, and so disserving it."); *Michael M.*, 450 U.S. at 471. For as this Court has made clear, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Board of Trs. v. Garrett*, 531 U.S. 356, 366–67 (2001) (quotation marks omitted); *see also Johnson v. Robison*, 415 U.S. 361, 378 (1974) ("[A] common characteristic shared by beneficiaries and nonbeneficiaries alike, is not sufficient to invalidate a statute when other characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups."). Simply put, "[t]he Constitution does

not require things which are different in fact or opinion to be treated in law as though they were the same." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). It is thus not surprising that "a host of judicial decisions" have concluded that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867–68 (8th Cir. 2006).[9]

More generally, this Court has recognized that "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Glucksberg*, 521 U.S. at 723 (quotation marks omitted). And no institution has been more universally practiced by common consent—not only throughout the history of this Nation, but until little more than a decade ago, everywhere and always—than that of marriage as a union between man and woman. This fact alone precludes Petitioners' remarkable claim that the age-old, ubiquitous institution of marriage is *irrational* and as

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[9] *See also, e.g.*, *DeBoer*, 772 F.3d at 404-06; *Alabama Policy Inst.*, 2015 WL 892752, at *34-37, *40; *Dean*, 653 A.2d at 363 (Steadman, J., concurring); *Baker*, 191 N.W.2d at 186-87; *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Standhardt*, 77 P.3d at 461-64; *Singer*, 522 P.2d at 1195, 1197; *Conde-Vidal v. Garcia-Padilla*, 2014 WL 5361987, at *10 (D.P.R. Oct. 21, 2014); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 919-20, 923 (E.D. La. 2014); *Jackson*, 884 F. Supp. 2d at 1111-14; *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308-09 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145-47 (Bankr. W.D. Wash. 2004); *Adams*, 486 F. Supp. at 1124-25; *Conaway*, 932 A.2d at 630-34; *Hernandez*, 855 N.E.2d at 7-8; *Andersen*, 138 P.3d at 982-85; *Morrison*, 821 N.E.2d at 23-31.

a matter of constitutional precept must be fundamentally redefined in a manner unknown in the record of human history until a few short years ago. To the contrary, a social institution that has prevailed continuously in our Nation's history and traditions and virtually everywhere else throughout human history—with nearly universal support from politicians, courts, philosophers, and religious leaders of all stripes—can justly be said to be rational *per se*. *See Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in judgment) ("[P]reserving the traditional institution of marriage" is a "legitimate state interest."); *cf. Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818–28 (2014); *Marsh v. Chambers*, 463 U.S. 783, 786–95 (1983). Indeed, given the close and abiding connection between the traditional definition of marriage and the vitally important interests that institution has always been understood to serve, we submit that laws at issue here satisfy any level of constitutional scrutiny, for as this Court has recognized, "history, consensus, and 'simple common sense'" may satisfy even the strictest scrutiny. *Florida Bar v. Went For It, Inc.*, 515 U.S. at 628.

IV. The Historical Understanding of Marriage and Its Purposes Demonstrates that the Traditional Definition of Marriage Does Not Demean or Stigmatize Same-Sex Relationships.

As the foregoing discussion makes clear, history provides a ready answer to why the traditional definition of marriage does not extend to same-sex relationships: the institution of marriage owes both its origin and its continued existence throughout history and

across civilizations to society's universal and compelling need to address the risks and benefits that arise from the unique procreative potential of sexual relationships between men and women. The societal purposes of marriage have never included disparaging or discriminating against gays, lesbians, or same-sex relationships. Indeed, ideas regarding sexual orientation simply did not play a role in the institution's development or in its universal practice. While "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis," *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972), scholars have suggested that "the concept of the homosexual as a distinct category of person did not emerge until the late 19th century," *Lawrence*, 539 U.S. at 568. In short, Petitioners' inability to marry in the Sixth Circuit flows not from bigotry or discrimination, but rather is "essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 n. 25 (1979).

More generally, societies throughout history have uniformly defined marriage as a relationship between individuals of opposite sex not because individuals in such relationships are deemed virtuous or morally praiseworthy, but because of the unique potential such relationships have either to harm or to further society's interest in responsible procreation. That is why marriage has never been conditioned on an inquiry into the virtues or vices of individuals who wish to marry. Society cannot prevent the immoral or the

irresponsible from engaging in potentially procreative sexual relationships, but it presumes that even such individuals are more likely to assume the shared responsibility of caring for any children that may result from such relationships if they are married than if they are not.

Conversely, the fact that same-sex relationships have traditionally not been recognized as marriages cannot reasonably be deemed to reflect a public judgment that individuals in such relationships are somehow inferior or undeserving; to the contrary, the history of marriage demonstrates that the institution's traditional definition reflects nothing more or less than the indisputable biological fact that same-sex relationships do not implicate society's interest in responsible procreation in the same way that sexual relationships between men and women do.

CONCLUSION

For the foregoing reasons, the Sixth Circuit's judgment should be affirmed.

Respectfully submitted,

CHARLES J. COOPER
Counsel of Record
HOWARD C. NIELSON, JR.
HOWARD N. SLUGH
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com

Counsel for Amici Curiae

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APPENDIX

LIST OF AMICI CURIAE

- Robert D. Benne, Ph.D., Jordan-Trexler Professor Emeritus and Research Associate, Roanoke College
- Allan C. Carlson, Ph.D., Former Distinguished Visiting Professor of History and Politics, Hillsdale College and President of the Howard Center for Family, Religion & Society
- Steven Justice, Ph.D., Chancellor's Professor of English, University of California at Berkeley
- James Hitchcock, Ph.D., Professor of History Emeritus, St. Louis University
- Robert C. Koons, Ph.D., Professor of Philosophy, University of Texas at Austin
- Stanley Kurtz, Ph.D. (anthropology), Senior Fellow, Ethics and Public Policy Center
- Gerald R. McDermott, Ph.D., Jordan-Trexler Professor of Religion, Roanoke College
- Robert Paquette, Ph.D., Professor of History, Hamilton University and Co-Founder of the Alexander Hamilton Institute
- Paul A. Rahe, Ph.D., Professor of History, Hillsdale College

- Michael A. Reynolds, Ph.D., Associate Professor of Near Eastern Studies, Princeton University
- Robert Louis Wilken, Ph.D., William R. Kenan, Jr., Professor of the History of Christianity Emeritus, University of Virginia